SUPREME COURT, U.S.
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No. 79-761

In the Supreme Court of the United States

OCTOBER TERM, 1979

JAMES B. PACKARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner seeks review of the dismissal of his action against the United States for damages for injuries claimed to have been suffered from the government's impairment of an alleged contract between him and the Internal Revenue Service.

The pertinent facts may be summarized as follows: On September 7, 1977, petitioner commenced this action in the United States District Court for the Eastern District of California, seeking $192,000 in damages as a result of the government's asserted impairment of an alleged contract between himself and the Internal Revenue Service (R. 6).[1] Petitioner claimed that the Employer's

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[1] "R." refers to the duplicated record filed in the court of appeals.

Quarterly Federal Tax Return (Form 941) that he filed in 1949, constituted a contract with the Internal Revenue Service which placed a ceiling upon the amount of Federal Insurance Contribution Act (FICA) taxes the government could collect from him, and that subsequent increases in the FICA tax rate impaired the obligation of that contract in violation of the Contract Clause (Article I, Section 10, Clause 1) of the Constitution (R. 3-6). Petitioner also contended that the increases in the FICA tax rate infringed his civil rights in violation of 42 U.S.C. 1983, and were an actionable tort under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* (see R. 1-2).

The district court dismissed the complaint for failure to state a cause of action upon which relief could be granted. The court, however, specifically provided that the dismissal was without prejudice and granted petitioner 30 days within which to file an amended complaint (Pet. App. 1-3). Petitioner did not amend the complaint, but instead filed a "Motion to Amend Findings" (R. 64-69) pursuant to Fed. R. Civ. P. 52(b). In denying petitioner's motion, the district court pointed out that Rule 52(b) was inapplicable because it had made no findings. See Fed. R. Civ. P. 52(a). Petitioner took no further action. As a result, on December 18, 1978, the court dismissed the action with prejudice for lack of diligent prosecution (Pet. Apps. E, F, and G). See Fed. R. Civ. P. 41(b). The court of appeals affirmed (Pet. App. B).

1. The courts below correctly dismissed the complaint for failure to state a cause of action. The Employer's Quarterly Federal Tax Return is merely a reporting form and contains no language which could possibly be construed as an agreement never to alter FICA tax rates. Indeed, even if the filing of the return could possibly be

viewed as a contractual agreement, no action based on an impairment of contractual obligation will lie against the United States. See *N.B. & C. Lines* v. *Director, Office of W.C.P.*, 539 F. 2d 378, 381 (4th Cir. 1976), cert. denied, 429 U.S. 1078 (1977); *Ames* v. *Merrill Lynch, Pierce, Fenner & Smith*, 567 F. 2d 1174, 1179 (2d Cir. 1977); *Jackson Sawmill Co.* v. *United States*, 428 F. Supp. 555, 560 (E.D. Mo. 1977), aff'd, 580 F. 2d 302 (8th Cir. 1978); *Century Arms, Inc.* v. *Kennedy*, 323 F. Supp. 1002 (D. Vt.), aff'd, 449 F. 2d 1306 (2d Cir. 1971), cert. denied, 405 U.S. 1065 (1972). Nor does the increase in the FICA tax rates violate petitioner's rights to due process. See *Fleming* v. *Rhodes*, 331 U.S. 100, 107 (1947).

2. At all events, assuming petitioner might have amended his complaint to allege facts stating a cause of action, the district court properly dismissed the complaint for lack of diligent prosecution. Such a decision is within the discretion of the trial court. See *e.g.*, *Anderson* v. *Air West, Inc.*, 542 F. 2d 522 (9th Cir. 1976); *Marshall* v. *Seilaff*, 492 F. 2d 917 (3d Cir. 1974). Here, the record shows that the district court acted well within the bounds of that discretion. In its first order, the court stated its reasons for dismissal and gave petitioner 30 days within which to amend his complaint. Petitioner chose, however, not to amend his complaint but instead merely repeated the same arguments made in the original complaint, in a misconceived motion under Rule 52(b). Moreover, after denial of his motion, petitioner did nothing for nine months and offered no explanation for his failure to pursue his case during that period. In these circumstances, the trial court was amply justified in dismissing the action for failure to prosecute.

3. Petitioner further argues (Pet. 9) that he was entitled to a default judgment on the ground that the government failed to file a proper response to his complaint. But as the district court found (Pet. App. 1), the government's motion to dismiss was timely filed under Fed. R. Civ. P. 5(b), 6(a), and 12(a). Moreover, contrary to petitioner's contention, neither the Federal Rules nor the district court's local rules require that a written notice of the hearing of a motion accompany each motion at the time of service. Rather, under the local rules, the only requirement is that such a notice be filed at least 28 days prior to a hearing on the motion. Here, the government served its notice of motion on November 21, 1977, and the hearing was set for January 3, 1978 (R. 31; Docket Entries). It therefore complied fully with the requirement of the local rules.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1980

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[2]At all events, even on the assumption that the government filed its motion to dismiss out of time, entry of a default judgment against the government would have been improper because petitioner failed to establish that he was entitled to relief. See Fed. R. Civ. P. 55(e); *Poe* v. *Mathews*, 572 F. 2d 137 (6th Cir. 1978); *Mason* v. *Lister*, 562 F. 2d 343, 345 (5th Cir. 1977).